Supreme Court of the United States

October Term, 1922.

No. 80.

DUESENBERG MOTORS CORPORATION, *Appellant*,
v.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellant.

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IN THE

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DUESENBERG MOTORS CORPORATION,
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THE UNITED STATES.

No. 80.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

I. STATEMENT OF CASE.

This is a claim for a breach of contract by the government in delaying the contractor in performance. The demurrer of the United States, rec. p. 66, was sustained, p. 67, and the petition dismissed. The opinion of the court is pp. 67-71.

Contract.

Contract was made November 20, 1917, pp. 9-31, between the United States and the Duesenberg Motors Corporation for 500 Liberty engines. Alterations of appellant's plant to permit this contract were at once begun but actual construction was not commenced because the government did not furnish specifications, petition, par. IV, p. 2.

December 11, 1917, a modified contract was made, p. 33, increasing the number to be delivered.

December 24, 1917, contractor was notified to stop work, par. VII, pp. 3, 4.

January 4, 1918, a new contract was made, rec. p. 35, for the production of 2,000 Bugatti motors and their separate parts, rec. p. 36, in lieu of the Liberty engines, pp. 53-54. This is the contract upon which the suit is based. Deliveries were to be made according to the following schedule:

"Article II.

"That, subject to all the conditions of Article III in said contract No. 2318 contained, the Contractor agrees to deliver said articles according to the following schedule:

"1918.	March	10
	April	50
	May	150
	June	400
	July	500
	August	500
	September	390
	Total	2,000"

It was a "cost-plus" contract, whereby the contractor was to receive cost, Article IV-VII, pp. 13-18, and a fixed profit of $750 for each motor delivered, Article III, p. 37.

The provisions of the original contract of November 20, 1917, except as modified herein, were made a part of this contract, Article VII, p. 38.

Later supplemental agreements of January 15, 1918,

p. 40, February 11, 1918, p. 42, and October 23, 1918, p. 55, provided for advances by the government to the contractor of $1,250,000, with interest at five per cent, $400,000, with interest at six per cent, and $1,250,000, with interest at seven per cent. These agreements were made under authority of the act of October 6, 1917, Chapter 79, 40 Stat. 383.

A number of provisions in the contract show the extreme importance of promptness. Article II, p. 10, opens:

"Time being of the essence of this contract, the contractor agrees to provide with the utmost dispatch, at the best prices obtainable:"

Article III, p. 12, of the original contract, after citing the original schedule, says:

"* * * inasmuch as speed of production is vital to the best interests of the Government and the People of the United States, the Contractor agrees that it will, if possible, and if requested to do so by the Contracting Officer, anticipate the foregoing schedule, and agrees to give the performance of this contract precedence over all other work for parties other than the Government."

The next paragraph expresses the contractor's obligation of "continuing performance with the utmost dispatch."

Article X, p. 20, makes the unusual provision that production and acceptance shall continue notwithstanding any discussion of changes "and shall not be interrupted thereby pending the final decision."

The formal order accompanying both the original contract and that of January 4, 1918, says that "early shipment is urgent", pp. 33, 39.

The supplemental agreements of January 15, February 11 and October 23, 1918, Article II, pp. 40, 42, 56, state that the proposed loan is "in order to expedite the delivery of the said supplies."

Specifications.

The agreement of January 4, 1918, Article I, p. 36, says that the contractor shall make "two thousand (2,000) Bugatti motors, and such spare parts for said motors as the Government may order from time to time during the period of the construction of said motors, in accordance with specifications to follow."

The petition, par. XI, p. 5, alleges that the above provision for "specifications to follow" and the provisions requiring complete delivery in March, 1918, were based upon a belief of the United States officers "that there were in existence complete specifications of the same which needed only to be obtained from France; that said Bugatti Motor had passed its experimental stage and was ready for production; and the statements in said contract operated as a representation to the claimant company that such was the fact and that production in quantity could begin at or shortly after the entry into said supplemental agreement of January 4, 1918."

The following allegations are then made, p. 5:

"When the first Bugatti engine was received in this country, shortly after the date of said supplemental agreement, it developed that extensive changes would be necessary. * * *

"An expert member of the engineering force of the Signal Corps of the United States Army was put in special charge, with instructions to make, as promptly as possible, such changes as were necessary for the production of the engine.

"The officers and experts of the claimant company diligently co-operated with the officers and experts of the Signal Corps of the Army in charge of production under this contract;

"but such extensive changes were necessary that no complete specifications were furnished to the claimant by the officers of the United States at any time prior to the 25th day of September, 1918, when the entire time allowed by the schedule of production of said supplemental agreement was within a few days of expiring;"

The result of these conditions is summarized by the allegation, p. 5:

"whereby it became impossible for the claimant, on account of the failure of the United States to furnish the required specifications, to produce any of the articles required by the contract within the time limit of the contract."

Par. XIX, p. 7, of the petition makes a similar allegation:

"The claimant now claims damages for the delay in the production of the Bugatti Motors, which delay was due to the fact that, without fault of the contractor, the specifications for the same were not furnished by the United States as provided in the supplemental agreement of January 4, 1918."

This is the breach of contract relied upon as the basis of the claim for damages. The items of claim are stated, *post*, p. 12.

While the demurrer admits the facts as stated to be true, it is deemed proper to append, as a matter of history of which the Court will take judicial notice, a statement about this contract from the official publication of the

War Department entitled "America's Munitions, 1917-1918, strictly according with the allegations of the petition. See Appendix A, *post*, p. 29. As to such publications, see *Romero* v. *United States*, 1 Wall. 721; *Jones* v. *United States*, 137 U. S. 202, 216, 217; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 169; *Caha* v. *United States*, 152 U. S. 211, 222; *New York Indians* v. *United States*, 170 U. S. 1, 32.

Termination.

The armistice intervened and the government terminated the contract, as permitted by Article XI, p. 20, upon delivery of 40 motors, par. XV, p. 6. An agreement of settlement was made August 14, 1919, par. XVI, p. 6, as set forth in Exhibit K, pp. 59-64. This reserved the right to prosecute the three items of claim here made in any court of competent jurisdiction. See petition, pars. XVII-XXI, pp. 7-9; Exhibit K, Article 10, pars. 2, 3, p. 63. These are as follows:

1. Claim for interest on money borrowed for use in executing the contract. See *post*, p. 22.

2. Claim for losses on commercial business terminated to accept this contract. See *post*, p. 25.

3. Claim for delay in production of Bugatti motors, due to their not being ready for production. See *post*, p. 19.

It is not claimed that the termination was a breach of contract; the breach was in the delay in furnishing the specifications prior to the termination. This delay was due to the motors not being ready for production.

II. ASSIGNMENT OF ERROR.

Appellant says that the Court of Claims made the following errors:

1. In holding that the claimant was not entitled to receive the fixed profit upon motors which it would have delivered but for the failure of the United States to furnish specifications within a time to permit deliveries within the time fixed by the contract.

2. In holding that the United States could charge the claimant with interest during a period in which the United States was delaying the work by its failure to furnish specifications.

3. In holding that the loss of the company on its commercial contracts in process preceding this contract was not properly chargeable to the United States on account of the default of the United States.

4. In sustaining the demurrer and dismissing the claimant's petition.

III. ARGUMENT.

Reservations in Settlement.

As to the right to make contracts of settlement, see *United States* v. *Corliss Steam Engine Co.*, 91 U. S. 321. As to the validity of reservations in contracts of settlement, see *Cramp Co.* v. *United States*, 216 U. S. 494; *Pneumatic Gun Carriage Co.* v. *United States*, 36 C. Cls. 71; *Noel Construction Co.* v. *United States*, 50 C. Cls. 98; *Peirce* v. *United States*, 50 C. Cls. 371.

Breach of Contract.

Appellant's position is:

(1) The contract made time of the essence of the contract and required deliveries to begin in March and

end in September, 1918, Article II, p. 36, and held the contractor to the most rigid rule of promptness.

(2) This provision necessarily implied that the United States must do everything required of the government in time to permit the contractor to comply with its obligations.

(3) The contract provision, Article I, p. 36, for "specifications to follow", necessarily implied that the specifications must be furnished in time to permit the deliveries to be made on time.

(4) The failure to furnish specifications in such time, —they were not complete until September 25, 1918,— was a breach of contract by the United States which entitles the contractor to recover for the losses caused thereby.

These propositions rest upon elementary principles:

(a) "What is implied is as effectual as what is expressed," *Shrewsbury* v. *United States*, 18 Wall. 664; *Equitable Insurance Co.* v. *Hearne*, 20 Wall. 494, 496; *United States* v. *Babbitt*, 1 Black 55, 61; *Black* v. *Woodrow*, 39 Md. 194; *Burt* v. *Stringfellow*, 45 Utah, 207.

(b) "Specifications to follow" implies within a reasonable time, but this means a reasonable time within the intent of this contract, when its parts are construed together. The schedule of deliveries, beginning in March, 1918, Article II, p. 36, shows that intent, as do the many expressions of the need of promptness quoted, *ante*, p.—. Delay in furnishing specifications until the closing days of the last month of deliveries fixed by the schedule was obviously a violation of the obligation to furnish specifications within a reasonable time. The reasonable time for delivering specifications of articles to be delivered in March, 1918, is a sufficient time before this date to permit manufacture and delivery by this date.

(c) Upon breach of contract by one party, the other may continue work without waiver of its right to damages. This was recently declared by this Court in *American Smelting & Refining Co.* v. *United States,* May 15, 1922, 257 U. S. —, as follows:

"Its claim if any must be for damages on the ground that the United States did not perform its part of the contract on time. Such a claim is not necessarily waived by completing performance. *St. Louis Hay & Grain Co.* v. *United States,* 191 U. S. 159, 164."

See also *Mansfield* v. *N. Y. Central R.R.,* 102 N. Y. 205, 210, quoted, *post,* p. 32; *McMaster* v. *State,* 108 N. Y. 542, 553; *Tobey* v. *Price,* 75 Ill. 645; *Merrimack Mfg. Co.* v. *Quintard,* 107 Mass. 127; *Garfield &c Co.* v. *Fitchburg R.R.,* 166 Mass. 119.

The principle is of special application to a war contract where refusal to continue would have resulted in confusion in the government's plans. The rule of law should conform to the obligation of patriotism.

(d) It is true that Article III, p. 12, of the original contract says:

"In view of the present uncertain factors inherent in the articles, and in the establishment of the industry of producing them, it is understood that this schedule may require revision, * * *."

Article II, p. 36, of the contract of January 4, 1918, makes the new schedule "subject to all the conditions of Article III" of the original contract. There was no revision of the schedule of the later contract, p. 36. The obligation of the government to furnish specifications in time to enable the contractor to meet this schedule

could only be changed by a revision of the schedule and that could only be made as permitted by Article X, p. 19, discussed, *post*, p. 17.

The provision of Article 5, p. 34, of the first supplemental agreement, providing that the schedule of deliveries for the second 500 Liberty motors should be agreed upon before February 1, 1918, marks the importance of the schedule as a factor in the contract.

The meaning and importance of specifications and the effect of failure to furnish them have been the subject of many judicial decisions. These are reviewed in Appendix B, *post*, p. 30.

Defense.

All the items of the claim rest on the above fundamental propositions. The Court of Claims, opinion, p. 71, answers:

"Under the contract, therefore, no more could be paid unless it is established that the United States by their act or acts prevented the plaintiff from performing the contract during its progress. No such allegation is made in the petition, for it appears that the parties mutually agreed to the delays now complained of. The very nature of the contract was such that changes in the specifications, and the delays incident thereto, were contemplated when the contract was entered into. The plaintiff took the risk of these changes and delays along with the risk that the contract might be terminated before the articles contracted for were completed. Having taken that risk the plaintiff can not now complain of the consequences, which it must have foreseen or contemplated the possibility of when it made the contract."

The first sentence needs amendment by substituting "default" for "act or acts", because the United States

might prevent performance and thus incur liability to the contractor as well by non-feasance as by malfeasance. The second sentence is in error because an allegation of non-performance of the obligation to furnish specifications in proper time is made in the petition, par. XI, p. 5, as herein fully quoted, *ante*, pp. 10, 11.

The remainder of the argument is that the parties agreed that changes might be made in the specifications, that delays are incident to change, that the parties therefore impliedly agreed to such delays and consequently that they equally agreed to delays arising from failure to furnish specifications at all.

The provision of the contract authorizing changes is contained in Article X, p. 19, of the contract of November 20, 1917, as follows:

"No changes shall be made in the drawings or specifications attached hereto and made a part of this contract, except as provided in this Article."

Provision is then made for change (a) by mutual agreement and (b) by order from the United States after a hearing given to the contractor.

It is submitted that the argument of the Court of Claims is fallacious for the following reasons:

(1) The parties never agreed to failure to furnish specifications or to delay in furnishing them. This is a different thing from furnishing specifications and then making changes.

(2) The contract provision for changes strictly limits the manner of authorizing changes. No rights can be predicated on this article except for changes made as there provided. This obviously does not include a failure to furnish specifications.

(3) The changes permitted under any such provision are changes of detail which do not essentially alter the nature of the article to be furnished. Such changes would not interfere with the general processes of production but only with its details and would thus not operate as a complete suspension of the work. Failure to furnish specifications suspends progress to the total extent of their absence. The above rule as to the extent of changes is laid down in *McMaster* v. *State,* 108 N. Y. 542, 551, as follows:

"It is difficult, probably impossible, to draw in advance a precise line between what is authorized by such reservation and what is not. It authorizes such changes as frequently occur in the process of constructing buildings, in matters of taste, arrangements and details; but it does not authorize a change in the general character of the building. If it does, a contract carefully entered into could be mainly if not entirely frustrated."

See to the same effect *Salt Lake City* v. *Smith,* 104 Fed. 457, 466 (C.C.A.); *Cook Co.* v. *Harms,* 108 Ill. 151, 158, 159; *Cleveland R.R. Co.* v. *Moore,* 170 Ind. 328. It was applied to a case of suretyship in *United States* v. *Freel,* 186 U.S. 309, 317, affirming 92 Fed. 299; 99 Fed. 237, and illustrated in *Henderson Bridge Co.* v. *McGrath,* 134 U.S. 260, 273.

(4) The contract of November 20, 1917, provided in Article I, p. 10, for delivery of 500 Liberty engines in accordance with the attached specifications, "including all authorized changes thereof." The contract of January 4, 1918, Article I, p. 36, provides for delivery of 2,000 Bugatti motors, "in accordance with specifications to follow," and says nothing about changes. It is open to question whether the omission from the later contract of

the provision for "authorized changes" just quoted from the earlier contract did not have the effect of dropping entirely from the later contract the provisions of Article X, p. 19, of the earlier contract providing the manner in which such authorized changes should be made. See Article VII, p. 38, of the later contract.

For these reasons it is insisted that appellant is entitled to claim damages for the delays caused by the failure of the United States to furnish specifications.

Failure to furnish specifications has repeatedly been held to be a basis for a claim for damages, as shown in the authorities fully reviewed in Appendix B, *post*, p. 30.

Wrongful suspension of a contract is equally a basis for damages as wrongful termination, *United States* v. *Smith*, 94 U. S. 214. See *Cotton* v. *United States*, 38 C.Cls. 536; *Houston Construction Co.* v. *United States*, 38 C.Cls. 724; *Moore* v. *United States*, 46 C.Cls. 139; *Rodgers* v. *United States*, 48 C.Cls. 443.

Items of Claim.

Profits Lost by Delay.

This is the third item reserved in the contract of settlement, Article 10, par. 3, p. 63, and alleged in the petition, par. XVII, p. 7. It is the first item claimed, par. XIX, pp. 7-8, and logically needs first consideration. The reservation is as follows:

"3. Claim asserted by the Contractor, arising out of the cancellation of the provisions for the production of Liberty Bugatti Motors and delay in production thereof, asserted by Contractor to be due to the Bugatti Motors not being ready for production. The Contractor reserves the right to prosecute such claims in any court of

competent jurisdiction. The Government denies the validity of any such claim and reserves the right to make any proper defense thereto."

The contract, Article II, p. 36, *ante*, p. 8, provides for deliveries between March and September, 1918, of the whole 2,000 motors. It grants, Article III, p. 37, a fixed profit of $750 for each motor. Complete specifications were not furnished by the United States officers and a release given by them for production until September 25, 1918, pars. XI, XII, pp. 5, 6. The armistice resulted in the government taking only 40 motors, par. XV, p. 6. Upon these the fixed profit was paid, par. XIX, p. 8, amounting to $30,000. This paragraph says, p. 8:

"If said specifications had been promptly furnished the claimant would have produced all of said Bugatti Motors within the time specified in said supplemental agreement and would have earned the seven hundred fifty dollars ($750.00) fixed profit provided for each motor, amounting, for the two thousand motors, to one million five hundred thousand dollars ($1,500,000.00)."

Profits were also to be earned on the manufacture of spare parts, Article V, p. 37, and upon savings made in manufacture, Article IV, p. 37; Article VI, pars. 7, 7a, pp. 15-16. The uncertainty of what would have been earned on these items is such that no claim under them is asserted.

Credit is given upon the above amount not only for the fixed profit allowed on the completed motors, but for that allowed on material in process, a total of $298,148.04, leaving a net claim of $1,201,851.96, par. XIX, p. 8.

Upon this state of facts, admitted by the demurrer, the loss of the profit which the contractor would have made before the date of termination is the measure of damages for the delay which caused the loss. It is not here claimed as a loss due to the termination of the contract, but as a loss due to the delay which prevented completion before termination. It is claimed under the definition of actual damages stated in *Philadelphia, W. & B. R.R. Co.* v. *Howard*, 13 How. 307, 344:

"Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.*"

The same principle is stated in *St. Louis Beef Co.* v. *Casualty Co.*, 201 U. S. 173, 181, as follows:

"In general, when one party by his fault prevents the other party to a contract from entitling himself to a benefit under it according to its terms, the former is liable for the value of that benefit less the value or cost of what the plaintiff would have had to do to get it."

In *United States* v. *Behan*, 110 U.S. 338, the court said, p. 344:

"The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. * * * The second item, profits, can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 69, they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself,

entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.'"

See also *United States* v. *Speed*, 8 Wall. 77, 84; *Roehm* v. *Horst*, 178 U. S. 1, 21.

Interest Expended.

This is the first item reserved in the contract of settlement, par. 1, p. 63, and alleged in the petition, par. XVII, p. 7. It is claimed in par. XX, p. 8.

The three supplemental agreements of January 15, February 11 and October 23, 1918, pp. 40, 42, 55, provide for advances by the government to the contractor. Interest is to be paid by the contractor upon these advances and the principal and interest are to be repaid by deductions from the amounts due from time to time to the contractor. It is to be observed that the interest itself, although a cost to the contractor, was excluded by the contract, p. 26, par. (4), from repayment as a cost and must therefore be paid by the contractor from its fixed profit, an item which was payable only on delivery of completed motors, p. 13, Article IV, par. (2); p. 37, Article III.

The interest ran under each agreement from its date, Article V, p. 41; Article V, par. *a*, p. 43; Article VII, p. 58, and continued until the final settlement of August 14, 1919, Article 3, p. 61, "computed to date of payment." It continued to be charged to this late date, although the agreement itself acknowledges unpaid credits beginning as early as January, 1919, to the sum of $148,543.51, which should have been earlier credited so as to stop the

payment of interest. See agreement, Articles 4-6, p. 61, explained in pars. 4-6, p. 65.

The government delayed the contractor by not furnishing specifications promptly and thus prevented complete deliveries and payment to the contractor of cost and profit, from which the borrowed money would have been paid. If the specifications had been furnished promptly, the deliveries would all have been made, as required by Article II, p. 36, by September, 1918, as alleged in the petition, par. XIX, pp. 7 8, and repayment then made of the entire advances.

Thus the interest which the contractor paid to the Government would not have been payable had the government furnished the specifications promptly.

The last advance would not have been made at all, as the contract would have been completed before its date. The government thus charged the contractor with a cost which was entirely due to its own default. This comes clearly within the rule of damages stated in the cases already cited.

See authorities cited in *Hatticsburg Lumber Co.* v. *Herrick*, 212 Fed. 834.

The obligation of the government to do its part toward the production of the articles and the obligation of the contractor to pay interest on the money advanced for the purpose of enabling him to speedily produce the articles were inter-dependent promises.

In *Bank of Columbia* v. *Hagner*, 1 Pet. 455, the court said, p. 465:

"In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest in-

justice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it.

"Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident the inclination of courts has strongly favored the latter construction, as being obviously the most just."

In *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 345, the court said:

"As is usually the case with building contracts, it evidently was in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed. In such cases a substantial compliance as to advance payments is a condition precedent to the contractor's obligation to proceed."

The application of this principle is clearly seen by realizing that according to the theory of its defense the government might have suspended production indefinitely, prevented the contractor from earning anything at all on this contract and compelled it to hold itself and its plant in readiness and yet, at the same time, have continued to charge interest to any length of time.

The payment of interest on a bank loan, petition, p. 8, par. XX, second item, made necessary by the same default is no less a direct item of damage to the contractor than the payment of interest to the United States.

The cost of revenue stamps on the notes also claimed, par. XX, p. 8, follows the same principle.

The provisions of Sec. 177 of the Judicial Code forbidding judgment in the Court of Claims for interest

upon a claim have no application to this item because this is not interest upon a claim. It is a loss directly inflicted upon claimant by the default of the United States. A far more liberal rule of construction of this section than is here required was made in *United States, v. New York*, 160 U. S. 598, where interest paid was allowed as an item of "costs, charges and expenses" reimbursable by the United States.

The Court of Claims says of this item, p. 71:

"The contract expressly provided that the plaintiff should pay interest on the sums of money advanced it by the United States. There is nowhere in the contract any qualification of this provision, and it is not perceived how this court can relieve the plaintiff of its obligation."

This court is asked to relieve the claimant of this obligation because it would not have been incurred except for the failure of the United States to perform its part of the contract.

Unabsorbed Commercial Losses.

When appellant undertook this contract, it had to discontinue its commercial business and suffered a loss of $238,261.26 in so doing, petition, par. III, p. 1; par. XIX, p. 7; claim reserved, par. XVII, p. 7; Ex. K, Art. X, par. 2, p. 63. It was expected that this loss would be made good out of the fixed profit of $1,500,000 on the completed motors, as well as the uncertain profit on spare parts and on savings under Articles IV, V, p. 37, Article IV, par. (3), p. 13, and Article VI, par. (7), p. 15. But profit was realized only to the extent of $298,-148.04, par XIX, p. 8, and the failure of the contractor to realize the entire profit and thus absorb the loss was

due to the failure of the United States to furnish the specifications on time. That the loss still rests upon the contractor is therefore the fault of the United States and the contractor should be reimbursed therefor.

The Court of Claims rejects this claim on the following ground, p. 71:

"The plaintiff voluntarily entered into the contract with the United States with full knowledge that its commercial contracts must be abandoned, and it was willing to do this and lose these commercial contracts in view of the large profits which it expected to receive under its contract with the United States."

No complaint would be made on account of this loss, had the United States not prevented the completion of the contract by its default, but the present existence of this loss is directly due to this default.

A loss of the same nature as this was allowed in *Baird v. United States*, 5 C.Cls. 348; affirmed by this court, 131 U. S. appendix cvi.

Two concessions must be made in regard to this item:

(a) If the contractor is allowed the amount of its profits as damages under the first item, this item is not allowable, as it is discharged by the profits.

(b) The United States is entitled to credit upon it in the proportion which the profits actually received bears to the total profits which would have been received had the default of the United States not occurred. It is impossible to state what would have been the profits on the spare parts under Article IV, p. 13. The loss of $238,261.26 should be amortized upon the basis of $30,000 received as profit on 40 motors delivered at $750 each in proportion to a total expected profit on 2000 motors, Ar-

ticle III, p. 37, a total of $1,500,000. The proportion thus absorbed is one-fiftieth, amounting to $4,765.23, and the balance still a loss to the contractor is $233,496.03. This is the correct basis. But if the loss of $238,261.26 is to be amortized upon the basis of $298,148.04 received out of a profit of $750 on each of 2,000 motors, Article III, p. 37, a total of $1,500,000, the proportion absorbed is $47,358.08 and the balance still a loss to the contractor is $190,903.18.

CONCLUSION.

The reference in the opinion of the Court of Claims above quoted to the "large profits" expected from this contract (a major fraction being repayable as excess profits taxes) alone justifies a statement of the present result of the contract, so far as shown in this petition.

The contractor suffered a loss on its commercial business, par. III, pp. 1, 2.....	$238,261.26
The contractor paid interest, par. XX, p. 8, not reimbursable as cost, Article V, p. 14; par. (4), p. 26.....	152,808.93
A total of losses herein disclosed..	$391,070.19
It has received as profit upon motors produced and materials in process, par. XIX, pp. 7-8.....	298,148.04
Leaving a net loss of.....	$92,922.15

This does not take into account the other non-reimbursable items of par. (4), p. 26, or the very great loss involved in getting the plant back into condition to do commercial work and the continuing overhead during that period.

It is respectfully submitted that the judgment of the Court of Claims sustaining the demurrer should be reversed and the case remanded for trial on its merits.

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APPENDIX A.

EXTRACT FROM "AMERICA'S MUNITIONS 1917-1918",

Government Printing Office, 1919,

Pp. 289, 290.

Another disappointing experience in attempting to produce a foreign designed motor in this country was the project to bring the manufacture of Bugatti engines to the United States. When our European aircraft commission arrived in France, the first experimental Bugatti engine had just made its appearance. It was apparently a long step in advance of any other motor that had been produced. This French mechanism was a geared 16-cylinder engine. It weighed approximately 1,100 pounds and was expected to develop 510 horsepower. It seemed to be the motor to supplement our own Liberty engine construction. Although heavier than a Liberty, it was much more powerful. The first Bugatti engine built in France was purchased by the Bolling commission and hurried to the United States with the urgent recommendation that we put it into production immediately and push its manufacture as energetically as we were pushing that of the Liberty engine.

The Signal Corps acted immediately upon this advice and prepared to proceed with the Bugatti on a scale that promised to make its development as spectacular as that of the Liberty. The Duesenberg Motors Corporation of Elizabeth, N. J., was even then tooling up for the production of Liberty engines. We took this concern from its Liberty work and directed it to assume leadership in the production of the Bugattis. The Liberty engine construction had been centered in the Detroit district. We now prepared to establish a new aviation engine district in the East, associating in it such concerns as the Fiat Plant at Schenectady, N. Y., the Herschell-Spillman Co., of North Tonawanda, N. Y., and several others. For a

time the expectation for the Bugatti production ran almost as high as the enthusiasm for the Liberty engine, but the whole undertaking ended virtually in failure, a failure again due to the tremendous difficulty in adapting foreign engineering plans to American factory production.

This was the story of it. In due time the sample Bugatti engine arrived, and with it were several French engineers and expert mechanics. But, once set up, the Bugatti motor would not function, nor was it in condition to run; for, as we discovered, during its test in France a soldier had been struck by its flying propeller. His body had been thrown twice to the roof of the testing shed, and the shocks had bent the engine's crank shaft. Then, too, we learned for the first time that the design and development of this engine had not been carried through to completion and that a great deal of work would be required before the device could be put into manufacture. The tests in France had developed that such a fundamental feature as the oiling system needed complete readjustment, and this was only indicative of the amount of work yet to be done on the engineering side of the production. We did our best with this engine; but to redesign it and develop it so that it could pass the severe 50-hour test demanded by our Joint Army and Navy Technical Board was the work of months, and after that the tooling up of plants had to be accomplished. The American Bugatti was just getting into production when the armistice was signed, a total of only 11 having been delivered.

APPENDIX B.

AUTHORITIES ON SPECIFICATIONS

1. Meaning and importance of specifications.

An able English work thus defines the purpose of specifications (Macassey & Strahan, Law of Civil Engineers, Architects, etc. (2d ed. 1897) p. 51):

"*Specifications.*—The specification of an intended work is the written description of such work, by means of which and the drawings the builder is able to form an estimate of the cost, and also to carry out the work to completion. * * * In general terms, the drawings indicate the dimensions and shape, while the specification describes the nature and quality of the material to be used in the intended work or building. It will, of course, be apparent that accuracy in the specification is essential, and a certain degree of fullness is also requisite."

The same authors (p. 44) remark how "a few words in a specification" may involve a large amount.

Nave v. *McGrane*, 19 Idaho, 111, 118, says:

"Specifications ought to be so definite as not to leave the quality of the material or of the workmanship in the construction of any part of the building to the mutatory whim or caprice of the supervising architect or contractor. In justice to both the owner and contractors, the plans and specifications and the contract for the construction of the building should be complete, definite and specific."

Emphatically is this true of this contract, where the contractor had no guide whatever as to the character of the articles required by the Government until the specifications were furnished.

2. Effect of failure to furnish specifications.

In *Hinckley* v. *Pittsburgh Steel Co.* 121 U. S. 264, affirming 17 Fed. 584, the contractor was to purchase six thousand tons of steel rails "to be drilled as may be directed," and to be delivered within a certain time. The purchaser failed to give the necessary drilling directions until the time had expired, and then refused to take any of the rails on the ground that the contract period was over. The court held the purchaser liable in damages for breach of the contract

In *Horst* v. *Rochm*, 84 Fed. 565, the court said (p. 570):

"The plaintiffs were, by the act of the defendant, prevented from making the deliveries called for by the contracts. It is this anticipatory denial and obstruction of the right to deliver, not a tender and refusal, which is the ground of suit, and the measure which might otherwise have been applicable is therefore wholly inappropriate. The law of damages is not comprised in a set of arbitrary rules."

This decision was affirmed by the Circuit Court of Appeals, 91 Fed. 345, and by the Supreme Court of the United States, 178 U. S. 1.

Stafford Co. v. *Alta Vista Mills*, 218 Fed. 759, involved the question of damages for failure to furnish specifications. After reviewing several pertinent decisions the court concluded (p. 764):

"In the case at bar the record indicates that defendant failed to give specifications which it agreed to furnish, because it had decided to change the class of goods to be manufactured, and did not want the kind of looms which had been ordered from the plaintiff. It therefore seeks to take advantage of its own refusal to comply with its part of the agreement in order to evade the contract obligation into which it had entered."

In *Mansfield* v. *N. Y. Central R. R.* 102 N. Y. 205, the same principle is involved.

The contractor agreed (p. 210):

"To commence the erection of the elevator within five days after notice from the engineer that the foundations are ready, and to complete the same ready for the use of all the lofting elevators within five months thereafter."

The owner notified the contractors that foundations were ready, but the statement was not true. There was a long delay before the foundations were actually prepared. The contractors for this reason were unable to complete within the time limited by the contract.

On suit brought by the contractors against the railroad for damages caused to them by delays in preparing the foundations, the court held them entitled to recover. The Court said (p. 210):

"It was the indispensable condition to the performance of any of the obligations assumed by the contractors that the foundations should be prepared, and unless they were to be so prepared, it rendered the whole contract motiveless and nugatory."

The decision is summarized as follows (syllabus, par. 1):

"Where the obligation of performance by one party to a contract presupposes the doing of some act on the part of the other prior thereto, the neglect or refusal by the latter to perform such act not only dispenses with the obligation of performance by the former, but also entitles him to rescind, or where recission will not afford him an adequate remedy, to continue the work, and recover such damages against the defaulting party as the delinquency has occasioned."

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14561—22— —1

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

DUESENBERG MOTORS CORPORATION, appellant,
v.
THE UNITED STATES. } No. 80.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal by the Duesenberg Motors Corporation, hereinafter called the contractor, from a judgment of the Court of Claims sustaining the demurrer of the United States to the petition of the claimant. The claim is based upon certain contracts between the contractor and the United States entered into during the war and terminated by the United States at the time of the armistice. The amount claimed is $1,201,851.96 (p. 9), and the claims are:

First. A claim for damages for delay in the completion of a contract for the production of 2,000 Bugatti motors, due to the fact, as alleged, that the specifications for the same were not seasonably furnished by the United States. The amount of this

for overhead and depreciation. *Interest*, rent, advertising, collection expenses, credit losses, discounts, and such taxes as income and excess-profits taxes imposed by the Government of the United States were not to be included, the language of the contract being that "nothing herein shall be deemed to include interest," etc. The profit to the contractor under this contract was $913.05 on each engine. In addition, he was to receive a specified profit upon such spare parts as might be ordered by the Government and an additional profit to be based upon any savings which he might effect from the estimated cost stated in the contract. Article XI of the contract (p. 20) contained provisions for its termination either because of the failure of the contractor to comply with its terms or in the event that in the opinion of the Chief Signal Officer of the United States Army the public interests should so require. In the event of the cancellation or termination of the contract for any reason other than the default of the contractor, the amounts to be paid by the Government were clearly set forth (p. 21), and finally it was provided that—

> In the event of the termination of this contract as aforesaid, any and all obligations of the Government to make any payments to the contractor hereunder, other than those specified in this contract, shall at once cease and determine.

All the subsequent contracts between the parties are called supplemental contracts; and while the

terms of the original contract were altered in many ways, the provisions regarding termination were not altered, and each supplemental contract distinctly reaffirmed the original contract in so far as it was not modified.

On December 11, 1917, a supplemental agreement was made. (Exhibit B, pp. 33–34.) By this agreement the fixed profit was changed from $913.05 to $625.00 for each engine. The amount of estimated cost was also changed, and it was agreed that the Government should place with the corporation an additional order for 500 engines, making 1,000 engines in all.

On December 24, 1917, the contractor was notified to stop work on the engines, as it had been decided to substitute at least an equal number of engines of a different type called the Bugatti motors.

On January 4, 1918, another supplemental agreement was made between the parties (Exhibit C, pp. 35–39) whereby it was provided that instead of the articles described in the previous contracts the contractor should make for the Government 2,000 Bugatti motors in accordance with specifications to follow. This agreement changed the profit which the contractor should receive from $625 to $750 for each engine and also provided (Art. VI, p. 37) that all costs and expenses incurred by the contractor in connection with the two previous contracts should be allowed and paid by the Government as part of the cost of making the Bugatti engines under the new contract, and, except as modified, the provisions

of the first contract should remain in full force and effect. This was the final production contract, and it is under it that the claims herein involved arise.

On January 15, 1918, a further agreement was made between the parties (Exhibit D, pp. 40–41) whereby the Government agreed to advance the contractor an amount of not more than $1,250,000, conditioned upon the approval of the War Credits Board, which the contractor was to repay *with interest* at 5 per cent.

On February 11, 1918, a further agreement was made between the parties (Exhibit E, pp. 42–45) making provisions for a further advance by the Government to the contractor of $400,000 *with interest* at the rate of 6 per cent.

On February 14, 1918, the parties entered into a further agreement (Exhibit F, pp. 46–68) relating to the purchase of the plant at Poughkeepsie, New York, of the F. I. A. T. Corporation, but this agreement does not seem to bear any relation to the controversy involved herein. To this agreement was annexed a schedule (Exhibit G, pp. 49–50).

On September 26, 1918, a further supplemental agreement was made between the parties (Exhibit H, pp. 51–54) regarding a testing building being erected at Elizabeth, New Jersey, but this agreement does not seem to have any bearing upon the present controversy.

On October 23, 1918, the parties entered into a further supplemental agreement (Exhibit I, pp. 55–59) providing for further advance payment by the

Government, upon which the contractor was to pay *interest* at the rate of 6 per cent.

While the construction of the Bugatti motors was actively proceeding, hostilities were suspended by the armistice, November 11, 1918. Whereupon the contract was terminated by the Government according to its terms. Thereafter the contractor submitted to the Secretary of War its claim for a settlement of the liability of the United States under its contract and, after negotiations, the settlement agreement of August 14, 1919 (Exhibit K, pp. 59–63), was made. This agreement was a complete settlement between the contractor and the United States of all matters growing out of the contracts with the exception of the three claims hereinbefore mentioned as the basis of this suit.

ARGUMENT.

The only basis for this claim is a desire to obtain through the Court of Claims damages for blasted hopes.

When the armistice came the contractor had a sure hope and expectation of making a profit of $1,500,000. This was as certain as anything in this world can be if the war continued, but when peace came this hope vanished. Such misfortune, however, does not justify a judgment against the United States. The relation of the parties was that of contractors, and their rights and liabilities were fixed by their written agreements. If the United States lived up to its contractual obligations, it is not liable

in damages, and we contend that the petition alleges no facts showing a breach of contract by the United States upon which liability may be predicated.

While the petition contains some statements finding fault with some things done by the Government, there is no allegation that it broke its contract. It is stated that the first contract provided that the engines should be in accordance with drawings and specifications attached thereto, but that no such drawings or specifications were annexed to the contract. Of course, the contractor knew this at the time the contract was made, and under Article III of that contract (p. 12) it is recited that the present uncertain factors inherent in the articles and in the establishment of the industry producing them are such that it was understood that the schedule might require revision. Paragraph 4 of the petition alleges that the drawings and specifications were furnished "piecemeal from time to time, but not so as to enable the claimant to enter into quantity production." This is not an allegation of breach of contract; and even if there was a breach of contract, it was waived by making the subsequent agreements (Exhibits B and C), and, as already pointed out, the later and final production contract contained a provision obligating the United States to pay all the costs and expenses incurred by the contractor under the two previous agreements, so the contract (Exhibit C) which substituted the Bugatti motors for the Liberty motors became the final contract between

the parties, and everything prior thereto became merged in that contract.

This contract provided for the making of the motors in accordance with specifications to follow. In the petition it is alleged that this provision, together with the provision for the delivery of the motors, and the absence of any provision for work of an experimental character, were based upon a belief on the part of the officers of the United States that there were in existence complete specifications which needed only to be obtained from France, and it is alleged that these statements in the contract operated as a "representation" to the contractor that such was the fact and that production in quantity could begin at or shortly after the making of the agreement. It turned out to be otherwise, however, and when the first Bugatti engine was received in this country, such extensive changes were necessary that no complete specifications were furnished prior to September 25, 1918. The time limit fixed by the contract had almost expired and a production release was given to the contractor and he was ordered to proceed with the production as required by the contract.

The appellant concedes that the termination of the contract was not a breach and his claim is that the breach was in the delay in furnishing the specifications prior to the termination. (Appellant's brief, p. 12.) His reasoning is (1) that the contract made time of the essence of the contract and required deliveries to begin in March and end in September,

1918, and held the contractor to the most rigid rule of promptness; (2) that this provision necessarily implied that the United States must do everything required in the covenant in time to permit the contractor to comply with its obligations; (3) that the provision of the contract for specifications to follow necessarily implied that the specifications must be furnished in time to permit the deliveries to be made on time; and (4) that the failure to furnish specifications in such time was a breach of contract. One would gather the impression from this that the primary object of this contract was to enable the contractor to earn his profit within a certain time, and that the delivery of the motors to the United States on time was a secondary consideration. There is no warrant for such an assumption either in the contract or in any principle of law. These provisions are obviously for the benefit of the Government and beyond question could be waived by the Government. If the Government was suing the contractor for failure to deliver within the specified time, it would be a complete defense that the specifications were not furnished in time. The appellant is trying to use a shield as a sword. We know of no authority, and the appellant has cited none upon his brief, which holds that the failure to furnish specifications furnishes an affirmative cause of action unless that failure was unreasonable, willful, or of a character to be covered by the word "wrongful."

Of course, the Government could not insist upon compliance by the contractor with the terms of the

contract unless it did its part, and it is also true that the furnishing of specifications must necessarily precede the construction of the motors, and if the Government had unreasonably or willfully or in any wrongful way neglected or refused to furnish specifications, that neglect or refusal would be a defense to the contractor and under certain circumstances might be an affirmative ground for relief; but the contract did not require the Government to furnish the specifications within any definite time, and there is no allegation that the delay was unreasonable, unnecessary, willful, or in any manner wrongful. The position of the appellant would lead to this conclusion, namely: If the motors had all been constructed, but the construction had lasted beyond September, and the contractor had been paid his entire profit under the contract, nevertheless he would have had a further claim because he had not received his profit within the original time. Mere *delay in earning his profit* is not a cause of action. The cause of action which he attempts to establish is for *loss of profit* and that loss was due to the termination of the war; and even if the war had not ended, the contract could have been terminated by its terms at any time.

Appellant in its brief refers frequently to the fact that the delay was not its fault. A cause of action, however, must be based not upon the appellant's lack of fault but upon the wrongful conduct of the Government, and nowhere in the petition is there any allegation of fact sufficient to charge the United States with wrongful conduct. Such allegation as

there is is contained in paragraph 11 of the petition on page 5. The substance of this allegation is that the statement made in the supplemental agreement of January 4, 1918, that the motors were to be constructed in accordance with specifications to follow, together with the provisions of the agreement providing for deliveries beginning with the month of March, together with the absence of any provisions in the contract for experimental work, "were based upon a belief on the part of the officers of the United States" that there were in existence complete specifications to be obtained from France. This is not an allegation of anything except the state of mind of the officers of the United States. The petition further states that "the statements in said contract operated as a representation to the claimant company that such was the fact." All this amounts to is that the provision in the contract calling for delivery of the motors within a certain time, and which provision was for the benefit of the Government, and not merely to enable the contractor to earn his profit within a certain time, was based upon an honest belief in the existence of certain facts subsequently found to be untrue.

It is not alleged that the contractor knew less about the situation than the Army officers, or that he believed the "representation" and trusted and relied upon it, and, furthermore, there is no such representation in the contract.

MacArthur Bros. Co. v. *United States*, decided by this court February 27, 1922, was an action to recover

damages for a breach of contract growing out of an alleged misrepresentation. The misrepresentation was alleged to be that the contract represented that a portion of the work would be done in the "dry" and a portion in the "wet," whereas it was impossible to do any of the work in the "dry," and it was all done in the "wet," at a cost greatly exceeding what it would have been had it been done the other way. The Court of Claims dismissed the petition upon demurrer by the Government, and its decision was affirmed by this court in an opinion by Mr. Justice McKenna, who, after examining the contract and various authorities, said:

> The elements which existed in each of the cited cases are absent from the case at bar. In the case at bar the Government undertook a project and advertised for bids for its performance. There was indication of the manner of performance, but there was no knowledge of impediments to performance, no misrepresentation of the conditions, exaggeration of them, nor concealment of them, nor, indeed, knowledge of them. To hold the Government liable under such circumstances would make it insurer of the uniformity of all work and cast upon it responsibility for all of the conditions which a contractor might encounter and make the cost of its projects always an unknown quantity.
>
> See also *Mansfield* v. *N. Y. C., etc., R. R. Co.*, 102 N. Y. 205, *infra*.

Neither misrepresentation, false representation, concealment, or fraud is alleged or intimated, and

the contract distinctly says, in Article III of the original contract, page 12 of the record, that "in view of the present uncertain factors inherent in the articles, and in the establishment of the industry of producing them, it is understood that this schedule may require revision." The schedule is the schedule of deliveries, and the subsequent contract, the one involved in the suit, makes this provision a part of that contract.

There was no protest made at the time. On the contrary, the allegation is that an expert engineering officer of the Army was put in charge with instructions to make as promptly as possible such changes as were necessary for the production of the engines and that the officers and experts of the claimant company diligently cooperated with the officers and experts of the Signal Corps. So the Government claims, not in any spirit of captious criticism of the petition as a pleading, but upon the merits, that it contains no allegations of any wrongful conduct on the part of the Government, which by any fair inference can be considered a breach of contract. As the Court of Claims expresses it, page 71:

> No such allegation is made in the petition, for it appears that the parties mutually agreed in the delay now complained of. The very nature of the contract was such that changes in the specifications, and the delays incident thereto, were contemplated when the contract was entered into. The plaintiff took the risk in these changes and delays along with the

> risk that the contract might be terminated before the articles contracted for were completed.

With the general principles of law so extensively set forth upon appellant's brief we have no quarrel. Not one of the authorities cited holds that a claim of breach of contract can be based upon anything short of wrongful conduct.

The issues involved in the case of *United States* v. *Behan*, 110 U. S. 338, are indicated by the following language from the opinion (p. 346):

> The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred.

In that case there was an abandonment by the United States of the work being performed.

The case of *St. Louis Dressed Beef & Provisions Company* v. *Maryland Casualty Company*, 201 U. S. 173, was an action founded on an employer's liability policy. The plaintiff had made a prudent settlement of a suit against it, which the defendant by its policy was obligated to defend and which it refused to defend, denying all liability. In a suit brought to recover the amount paid in settling the case this court held that the defendant was liable. This case has no bearing whatever upon the present case.

The case of *Philadelphia, Wilmington & Baltimore Railroad Company* v. *Howard*, 13 Howard 307, was an action in which a contract was annulled. The syllabus says:

> If the company annulled the contract merely for the purpose of having the work done cheaper, or for the purpose of oppressing and injuring the contractor, he was entitled to recover damages for any loss of profit he might have sustained; and of the reasons which influenced the company, the jury were to be the judges.

The case of the *American Smelting & Refining Company* v. *The United States*, decided May 15, 1922, was a claim for over $500,000, being the price of 20,000,000 pounds of copper at 26 cents per pound, less payments received at 23½ cents. The order was accepted at a time when the price-fixing committee of the War Industries Board had fixed the price at 23½ cents per pound. All of the copper, except the 20,000,000 pounds, was delivered before July 2, 1918, on which date the price was advanced to 26 cents per pound. The reason why all the copper was not delivered prior to that date was the alleged delay due to the failure of the Government to send shipping orders and to the further fact that deliveries were made impossible by the Government's appropriating all the available copper for other uses. Nevertheless the Court of Claims sustained a demurrer to the petition, and its judgment was affirmed by this court in an opinion by Mr. Justice Holmes.

In *United States* v. *Smith*, 94 U. S. 214, the only question presented was the liability of the United States for damages growing out of the suspension of work under a contract sued upon. The contract bound Smith to do the work and *no power was reserved by the United States to direct its suspension.* The work was stopped by order of the United States. Smith asked to be released from his contract unless he could go on. This was refused until the expiration of 60 days, when he was allowed to resume.

In *McMaster* v. *New York*, 108 N. Y. 542, there was a clear breach of a contract for furnishing of sandstone for the erection of certain buildings in accordance with plans and specifications. After three of the buildings had been completed according to the plans and contracts, the managers resolved to build the other buildings with brick, with sandstone trimming, instead of building them of sandstone, as originally provided. The contractors protested against the change, but furnished and cut the sandstone required, and received pay at the prices fixed. After completing six buildings they were notified to remove the stone, all work was stopped, and nothing done toward the erection of the five remaining buildings.

It was held that this was unauthorized and that the State could not abandon performance for an indefinite period, but was bound to go on without any unnecessary delay until all the buildings were completed and that the abandonment of the work as to the five buildings entitled the contractors to dam-

ages. The breach of contract was gross and palpable. The reasoning of the New York Court of Appeals in this case is illustrated by the following language, which immediately precedes that quoted on page 18 of the appellant's brief:

> The general character of the buildings could not be changed so that the buildings would not be the same contracted for; if it could be, then a public letting in such a case would not be a useful and might be an idle ceremony. Under such a reservation could a building planned for five stores be reduced to two? Could a stone building let to a stonemason be changed to wood or brick? Could the five connecting wards be reduced to two or three or four? We are clear that authority for such extensive changes could not be found in such language. If the State could change the brick walls with sandstone trimmings, then it could change to walls made wholly of brick and thus there would be no stone to cut and the cutting contract would be entirely nullified.

The case of *United States* v. *Freel*, 186 U. S. 309 merely held that the surety on a contractor's bond for the construction of a dry dock was released by a change, made without his consent, in the location of the dock which required the contractor to make additional excavations and connections at an increased expense, and gave an increased time of performance.

In *Mansfield* v. *New York Central, etc., R. R. Co.*, 102 N. Y. 205, the action was brought to recover damages for breach of contract for the construction

of an elevator. The contractors agreed to commence work within five days after notice from defendant's engineer that the foundations were ready, and to complete the same within five months; and it was agreed that the contractors should receive, in addition to the contract price, $500 for each day less and to pay $500 for each day more than the time stipulated occupied in the work. Defendant served the notice required, *but at the time of such service the piers and foundation walls were not completed.* In an action for damages by reason of increased expense in doing the work, and for losses arising from delay caused by the want of readiness on the part of the defendant, the court held the action could be sustained. The court pointed out that notice to be given was *of an actually existing condition, and not the expression of an opinion* on the part of the engineer that the foundations were sufficiently advanced to enable the contractors to prosecute their work advantageously, and that there was no rule of law which would justify a party required to give notice to another of the existence of a fact upon which important obligations depend, to do so untruly, or in such a manner as to prejudice the rights of the party entitled to notice. And the court said, on page 212:

> A construction which enabled the railroad company to retard the prosecution of the work by the contractors, or disabled them from employing all of the agencies or force which in their judgment could wisely and advantageously be used in its performance, would operate

> as a fraud upon them and render their covenant to complete the work in five months a reckless and foolhardy undertaking.

The court further said that—

> It was unreasonable to suppose that the parties intended to enter into obligations providing for the performance of work by one party under a heavy penalty for nonperformance within a given period which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion.

There is no allegation in the present case of any action by the United States or any of its officers which would "operate as a fraud."

In the absence of any allegation showing a breach of contract by the United States, the authorities upon the measure of damages require no discussion.

(*a*) *As to the claim for prospective profits.*—Article XI of the contract provides that upon termination the Government shall pay to the contractor all expenses incurred in connection with the performance of the contract and not already paid to the contractor, including all material purchased; all costs of production, overhead, general administrative expenses, etc., as itemized in article 5 of the contract, and also on each finished article accepted, the sum provided as fixed profit, and on all unfinished articles and parts thereof, a sum to be determined in a manner specified, and all obligations of the Government to make any payments to the contractor other than those specified shall at once cease and determine. These

payments were made to the contractor, or at least all matters of that character were adjusted by the settlement agreement (Exhibit K). There was no provision in the contract requiring the Government under any circumstances to pay anything for loss of prospective profits. The Government did not *guarantee* that the contract would be completely performed. On the contrary it reserved the right to terminate at any time on thirty days' notice. The contractor took that risk. Indeed, that was the only risk it did take—the risk of not making as much money as it hoped to make. It can not recover from the Government damages because the war came to an end before that hope was realized.

(*b*) *As to the claim for interest.*—Pursuant to the supplemental agreements (Exhibits D, E, and I), the United States advanced to the contractor $2,150,000, and the agreements distinctly provided that the amounts advanced should be repaid with interest in any event, *including the termination of the principal agreement by the Government* (pp. 41, 43, 58). The contractor also borrowed money from the First National Bank of New York and claims to have paid by way of interest upon these loans $152,278.93, together with the sum of $530 for revenue stamps attached to the notes.

By Article II of the contract (Exhibit A), which remained in force throughout all transactions, the contractor agreed to furnish such organization, plant, labor, material, etc., as might be necessary. The contractor was to receive the actual cost of production

as defined in Article V, but in estimating actual cost nothing was to be allowed on account of interest. There is no provision in any of the agreements which by possible inference can give color to any claim for interest. This item of the claim is wholly without merit, and the Comptroller of the Treasury has so decided (26 Comp. Dec. p. 192).

Of course, when the claimant borrowed money and gave its notes, stamps had to be affixed to the notes. The Government did not agree to bear any of the expenses involved in this whether the money was borrowed from the bank or from the Government itself. The cost of the revenue stamps was merely incidental to the interest upon the loans, which was expressly excepted from the costs which the Government was to pay.

The case of *United States* v. *New York*, 160 U. S. 598, cited by appellant in support of this item, involved the question of payments to be made by the United States to the State of New York to reimburse it for expenses in raising troops for the national defense under the act of Congress of July 27, 1861. The act provided that the State should be reimbursed for the "costs, charges, and expenses properly incurred." This court said that the only inquiry was whether, within the fair meaning of these words, interest paid by the State of New York on moneys borrowed for the purpose of raising, subsisting, and supplying troops to be employed in suppressing the rebellion could be included, and held that it could be.

(c) *As to the claim for unabsorbed investment.*— is alleged in the petition that at the time the first ontract was made the contractor was engaged in he production of engines and had large commercial ontracts and that he had "an unabsorbed invest- ent" of $238,261.26 in these contracts which e would have received back but which became a otal loss. In none of the contracts can there be ound any provision which even remotely suggests hat the Government would reimburse the contractor or any item of this kind, and the allegation that he ould have received it back is merely the highly peculative conclusion of the pleader.

It is alleged that it became necessary for the con- ractor to discontinue all these contracts, and that he officers of the Government required the con- ractor to do so. The contractor was probably lad to do so, if that was made a condition of obtain- ng the Government contracts.

Nevertheless, the contract did not so require and rovided merely that the claimant should "give the erformance of this contract precedence over all ther work for parties other than the Government." his claim is wholly outside of the terms of settle- ent provided for in the contract.

Appellant cites upon his brief as authority for this tem of his claim the case of *Baird* v. *United States*, 31 U. S. appendix CVI, a case wholly without pplication.

That was an action upon a contract between the surviving partner of a firm of locomotive builders

and the United States for the construction of 15 locomotive engines. The locomotives were to be constructed at the "earliest practicable period," "to the exclusion of all other interests or contracts whatever, it being understood" that the contractors would be "indemnified from any damage resulting from a compliance of this order." It was added that "in replacing any engines taken from other parties in filling this order you are authorized to charge the Government any advance in the cost of labor and materials over the cost of those on the 9th of November, 1863." In affirming the judgment of the Court of Claims in favor of the claimant, this court said (131 U. S. appendix CVIII):

> It is equally clear that the 15 engines constructed for the Government displaced and postponed the construction of an equal number under the contracts of Baldwin & Co. with other parties, and subjected them to a loss of $1,250 on each engine so postponed. If the indemnity clause has any meaning or effect it must be held to include this charge also.
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> See also *Morrisdale Coal Co.* v. *United States*, decided by this court May 29, 1922.

Assuming that the contractor had, at the time it began its work for the Government, various outstanding business ventures in which it had an unabsorbed investment, it is, of course, only fair to assume that the claimant expected to make enough money out of its Government contracts so that it

could afford to lose something on its other business. The end of the war and the termination of the Government contracts naturally brought disappointment.

Hope deferred may make the heart sick, but it gives the Court of Claims no jurisdiction.

CONCLUSION.

No cause of action being set forth in the petition, the judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
OCTOBER, 1922.

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